The Attorney General of Malaysia v Dato' Sri Mohd Najib bin Tun Hj Abdul Razak and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(i)-12–05 OF 2025(W) AND 01(i)-13–05 OF 2025(W)
HASNAH HASHIM CJ (MALAYA), ZABARIAH YUSOF AND HANIPAH FARIKULLAH FCJJ
13 AUGUST 2025

Evidence — Fresh or further evidence — On appeal — Whether respondent had satisfied requirements of r 7(3A) of Rules of Court of Appeal 1994 ('the RCA') to allow fresh evidence to be admitted — Whether addendum order sought to be admitted was unavailable to respondent when his leave application for judicial review ('JR') was before High Court — Whether truth and validity of addendum order had to be determined at substantive hearing of JR application — Whether r 7(3A) of the RCA encapsulated principles for admission of new evidence laid down in Ladd v Marshall [1954] 3 All ER 745 — Whether application for leave to file JR was not interlocutory for purposes of r 7(2) of the RCA so as to permit fresh evidence to be adduced without obtaining leave

The respondent, a former Prime Minister of Malaysia, was sentenced to 12 years' jail and fined RM210m after being found guilty of committing various criminal offences. Following the Federal Court's affirmation of the convictions and sentence, the respondent applied for a full pardon from the Yang di-Pertuan Agong ('YDPA') pursuant to art 42 of the Federal Constitution. The YDPA, acting together with the Pardons Board, reduced the respondent's jail term to six years and his fine to RM50m. The respondent subsequently claimed that apart from ordering the reductions in his sentence, the YDPA had also issued a supplementary order ('the addendum order') that he serve out the remainder of his reduced jail term under house arrest. After efforts by his solicitors to obtain confirmation from various authorities as to the existence and details of the addendum order drew a blank, the respondent applied for leave to file a judicial review ('JR') application to compel the appellant to: (a) confirm the existence of the addendum order and to provide the respondent with a copy thereof; (b) allow the respondent to serve out the remainder of his reduced jail term under house arrest at his residence in Kuala Lumpur. The High Court dismissed the leave application after finding that the respondent had not raised an arguable case that required further investigation at the substantive JR stage and had also not met the criteria for grant of the mandamus orders that he sought. The respondent appealed against the decision to the Court of Appeal ('COA'). Two days before the appeal hearing, the respondent filed encls 26 and 50 to adduce fresh evidence at the hearing.

The fresh evidence included a purported copy of the addendum order and two affidavits affirmed by the respondent's son who deposed as to how he had obtained a copy of the addendum order. The majority of the COA set aside the High Court's decision, granted the respondent leave to file the JR application, allowed the exhibited addendum order to be admitted into evidence, dismissed encl 50 and ordered the substantive JR application to be heard by a new High Court judge. At the hearing of the instant appeals against the COA's decision, the appellant admitted that the addendum order did exist.

Held, unanimously dismissing the appeals and affirming the COA's decision except in respect of encl 50 which was partly allowed:

(1) The respondent had satisfied the requirements under r 7(3A) of the Rules of the Court of Appeal 1994 ('the RCA') to admit the addendum order as new evidence to be used at the substantive hearing of the JR application. The chronology of events showed that up until the time the High Court dismissed the respondent's JR leave application, efforts by his solicitors to obtain confirmation from the authorities about the addendum order and its details had met with a dead end. Following the High Court's decision, efforts to obtain the addendum order were continued by the respondent's son, Mohamad Nizar, who deposed an affidavit in December 2024 exhibiting a purported copy of the addendum order and stating the grounds for his belief that the document was true (see paras 94–97 & 104).

(2) The truth or otherwise of the Addendum Order and of its validity was not determinable conclusively at this stage. They were matters that needed to be fully investigated and ascertained at the substantive hearing of the JR application (see paras 102 & 106).

(3) Rule 7(3A) of the RCA encapsulated the essential features of the test for admission of new evidence laid down in *Ladd v Marshall* [1954] 3 All ER 745. Although the exact wordings of the essential elements in *Ladd v Marshall* and the elements in r 7(3A) of the RCA were not word per word the same, the effect and consequence of applying the elements in r 7(3A) and the elements in *Ladd v Marshall* led to the same conclusion (see para 107).

(4) Rule 7(3A) of the RCA did not impose a higher threshold by requiring proof of a 'determining influence' which exceeded the 'important influence' threshold established in *Ladd v Marshall*. Notwithstanding the different semantics, 'important influence' was comparable to 'determining influence' because at the appellate level, the question was whether the particular piece of evidence sought to be admitted would have affected the outcome of the case at the court below if it had been considered. Hence, the demarcation between 'important' and

'determining' influence was of no consequence (see paras 2, 77–78, 80 & 108).

(5) As for admission of fresh evidence without the need to obtain leave under r 7(2) of the RCA, a JR leave application was not an interlocutory one. Hence, leave was required to adduce fresh evidence. This was because although a leave application for JR was interlocutory in form, refusal of leave would determine the applicant's rights with finality as he could no longer proceed with the hearing of the substantive JR application. The use of the word 'may' in r 7(2) of the RCA also gave the court the discretion whether or not to admit the fresh evidence considering all the circumstances of the case (see paras 46–47).

[Bahasa Malaysia summary

Responden, seorang bekas Perdana Menteri Malaysia, telah dijatuhkan hukuman penjara 12 tahun dan denda RM210 juta selepas disabitkan bersalah atas beberapa kesalahan jenayah. Setelah sabitan dan hukuman tersebut disahkan oleh Mahkamah Persekutuan, responden memohon pengampunan penuh daripada Yang di-Pertuan Agong ('YDPA') menurut perkara 42 Perlembagaan Persekutuan. Yang di-Pertuan Agong, bertindak bersama Lembaga Pengampunan, telah mengurangkan hukuman penjara responden kepada enam tahun dan dendanya kepada RM50 juta. Responden kemudiannya mendakwa bahawa selain daripada pengurangan hukuman tersebut, YDPA juga telah mengeluarkan satu perintah tambahan ('perintah tambahan') supaya baki tempoh penjaranya dijalani dalam tahanan rumah. Selepas peguamnya gagal mendapatkan pengesahan daripada pihak berkuasa berhubung kewujudan dan butiran perintah tambahan itu, responden memohon kebenaran untuk memfailkan SK bagi memaksa perayu untuk: (a) mengesahkan kewujudan perintah tambahan tersebut dan menyerahkan salinannya kepada responden, serta; (b) membenarkan responden menjalani baki hukuman penjara yang dikurangkan itu di kediamannya di Kuala Lumpur. Mahkamah Tinggi menolak permohonan kebenaran tersebut setelah mendapati responden tidak menimbulkan isu yang boleh dipertikaikan sehingga memerlukan penelitian lanjut pada peringkat substantif SK, dan juga gagal memenuhi kriteria bagi perintah mandamus yang dipohon. Responden kemudian merayu ke Mahkamah Rayuan ('MR'). Dua hari sebelum pendengaran rayuan, responden memfailkan lampiran 26 dan 50 untuk mengemukakan keterangan baharu. Keterangan baharu itu termasuk salinan perintah tambahan serta dua afidavit yang disahkan oleh anak responden yang menyatakan bagaimana beliau memperoleh salinan perintah tambahan tersebut. Majoriti MR membatalkan keputusan Mahkamah Tinggi, memberikan kebenaran kepada responden untuk memfailkan permohonan SK, menerima perintah tambahan yang dikemukakan sebagai keterangan, menolak lampiran 50, dan memerintahkan permohonan SK substantif didengar oleh seorang hakim Mahkamah Tinggi yang baharu. Dalam

pendengaran rayuan ini terhadap keputusan MR itu, perayu mengakui bahawa perintah tambahan tersebut memang wujud.

Diputuskan, sebulat suara mengenepikan rayuan-rayuan dan mengekalkan keputusan MR kecuali lampiran 50 yang dibenarkan sebahagian:

(1) Responden telah memenuhi keperluan di bawah k 7(3A) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KKMR') untuk mengemukakan perintah tambahan sebagai keterangan baharu yang akan digunakan dalam pendengaran substantif permohonan SK. Kronologi peristiwa menunjukkan bahawa sehingga Mahkamah Tinggi menolak permohonan kebenaran SK oleh responden, segala usaha peguam caranya untuk mendapatkan pengesahan daripada pihak berkuasa berhubung perintah tambahan tersebut dan butirannya telah menemui jalan buntu. Selepas keputusan Mahkamah Tinggi, usaha untuk mendapatkan perintah tambahan itu diteruskan oleh anak responden, Mohamad Nizar, yang telah membuat satu afidavit pada Disember 2024 dengan melampirkan salinan yang dikatakan sebagai perintah tambahan serta menyatakan alasan bagi kepercayaannya bahawa dokumen tersebut adalah tulen (lihat perenggan 94–97 & 104).

(2) Kebenaran perintah tambahan tersebut serta kesahihannya tidak dapat ditentukan secara muktamad pada peringkat ini. Perkara-perkara tersebut perlu disiasat dan dipastikan sepenuhnya dalam pendengaran substantif permohonan SK (lihat perenggan 102 & 106).

(3) Kaedah 7(3A) KKMR merangkumkan elemen-elemen penting ujian bagi kemasukan keterangan baharu sebagaimana yang ditetapkan dalam kes *Ladd v Marshall* [1954] 3 All ER 745. Walaupun perkataan tepat bagi elemen-elemen penting dalam *Ladd v Marshall* dan elemen-elemen dalam k 7(3A) KKMR tidaklah sama sepenuhnya dari segi perkataan, kesan dan akibat daripada penerapan elemen-elemen tersebut yang membawa kepada kesimpulan yang sama (lihat perenggan 107).

(4) Kaedah 7(3A) KKMR tidak mengenakan ambang yang lebih tinggi dengan mensyaratkan pembuktian suatu 'pengaruh penentu' ('determining influence') yang melebihi ambang 'pengaruh penting' ('importance imfluence') sebagaimana yang ditetapkan dalam kes *Ladd v Marshall*. Walaupun terdapat perbezaan dari segi semantik, 'pengaruh penting' adalah sama dengan 'pengaruh penentu' kerana di peringkat rayuan, persoalan yang timbul ialah sama ada keterangan tertentu yang ingin dikemukakan itu akan mempengaruhi hasil kes di mahkamah bawahan sekiranya ia dipertimbangkan. Oleh itu, perbezaan antara 'penting' dan 'penentu' adalah tidak berbangkit (lihat perenggan 2, 77–78, 80 & 108).

(5) Berhubung dengan kemasukan keterangan baharu tanpa perlu

mendapatkan kebenaran di bawah k 7(2) KKMR, permohonan kebenaran untuk memulakan prosiding SK bukanlah satu permohonan bersifat interlokutori. Justeru, kebenaran diperlukan untuk mengemukakan keterangan baharu. Hal ini kerana walaupun suatu permohonan kebenaran untuk SK berbentuk interlokutori daripada segi bentuk, penolakan terhadap permohonan tersebut akan menentukan hak pemohon secara muktamad kerana beliau tidak lagi boleh meneruskan dengan pendengaran substantif SK. Penggunaan perkataan 'may' ('boleh') dalam k 7(2) KKMR juga memberikan budi bicara kepada mahkamah untuk membenarkan kemasukan keterangan baharu dengan mengambil kira semua keadaan kes (lihat perenggan 46–47).]

Cases referred to

Al-Sadeq v Dechert LLP and others [2024] EWCA Civ 28, CA (refd)
Al-Koronky and another v Time-Life Entertainment Group Ltd and another [2006] EWCA Civ 1123, CA (refd)
Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co) [2019] SGCA 41; [2019] 2 SLR 341, CA (refd)
Chai Yen v Bank of America National Trust & Savings Association [1980] 2 MLJ 142, FC (refd)
E (children: reopening findings of fact), Re [2020] 2 All ER 539, CA (refd)
Gilbert v Endean (1878) 9 Ch D 259, Ch D (refd)
Hamilton v Al Fayed [2000] All ER (D) 2450; [2001] EMLR 15, CA (refd)
Hertfordshire Investments Ltd v Bubb and another [2000] 1 WLR 2318, CA (refd)
Juraimi bin Husin v Pardons Board, State of Pahang & Ors [2002] 4 MLJ 529, FC (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70, FC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
OpenNet Pte Ltd v Info-communications Development Authority of Singapore [2013] 2 SLR 880, CA (refd)
PP v Soon Seong Sia Heng [1979] 2 MLJ 170, FC (refd)
R (Al Siri) v Secretary of State for the Home Department [2021] EWCA Civ 113, CA (refd)
Rossage v Rossage and others [1960] 1 WLR 249, CA (refd)
Singh and ors v Habib & Anr [2011] EWCA Civ 599, CA (refd)
Terluk v Berezovsky [2011] EWCA Civ 1534, CA (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442, SC (refd)
V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd [2025] 2 MLJ 744, FC (refd)
Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government [2011] 2 AC 304, SC (refd)

Legislation referred to

Civil Procedure Rules 1998 [UK] r 52, 52.21(2)
Courts of Judicature Act 1964 s 69(2), (3)
Federal Constitution art 42, 42(4)(b), (5), (8)
Laws of the Constitution of Pahang art 15
Rules of Court 2012 O 41 r 5, 5(2), O 53, O 53 rr 3, 7, O 55 r 7
Rules of Court 2021 [SG] O 18 r 8(6)
Rules of the Court of Appeal 1994 r 7, 7(2), (3A), (3A)(a), (3A)(b)
Rules of the Federal Court 1995 r 3
Rules of the Supreme Court [UK] O 38, O 38 r 3
Supreme Court of Judicature Act 2007 [SG] s 59(4), (5)
Supreme Court of Judicature Act 1969 [SG] Fifth Schedule, para (e), (e)(iv)
Supreme Court Rules 2024 [UK]

Appeal from: *Dato' Sri Mohd Najib bin Tun Hj Abd Razak v Menteri Dalam Negeri & Ors* [2025] 4 MLJ 440 (Court of Appeal, Putrajaya)

Tan Sri Dato' Mohd Dusuki bin Mokhtar (with Shamsul bin Bolhassan, Ahmad Hanir bin Hambaly @ Arwi, Nurhafizza bt Azizan, Safiyyah bt Omar, Ainna Sherina bt Saipolamin and Siti Nurfarhana Muhammad Azmi) (Attorney General's Chambers) for the appellant.

Tan Sri Dr Muhammad Shafee bin Abdullah (with Muhammad Farhan bin Muhammad Shafee, Wan Muhammad Arfan bin Wan Othman, Nur Syafiqah bt Mohd Sofian, Naresh a/l Mayachandran, Tharrence Anthony (Pupil-in-Chambers) and Mohd Hafeez bin Rahim (Pupil-in-Chambers)) (Shafee & Co) for the respondent.

Zabariah Yusof FCJ:

[1] There are two appeals by the learned Attorney General of Malaysia before us, namely:

(a) Civil Appeal No 01(i)-12–05 of 2025(W):
Appeal against the entirety of the majority decision of the Court of Appeal dated 6 January 2025 which allowed the respondent's appeal and set aside the entire decision of the High Court judge dated 3 July 2024, which dismissed the application for leave for judicial review, with no order as to cost; and

(b) Civil Appeal No 01(i)-13–05 of 2025(W):
Appeal against the entirety of the majority decision of the Court of Appeal dated 6 January 2025, that allowed the respondent's application in encl 26 (application to adduce additional evidence) dated 3 December 2024 at the Court of Appeal with no order as to costs.

[2] The two appeals before us are premised upon the following questions of law:

(1) Whether the principles established in *Ladd v Marshall* [1954] 3 All ER 745 ('Ladd v Marshall') have been codified or merely reflected in Rules 7(3A) of the Rules of Court of Appeal 1994 ('RCA 1994');

(2) Whether Rule 7(3A) of the RCA 1994 renders the principles in *Ladd v Marshall* concerning the admission of fresh or additional evidence in the Court of Appeal no longer applicable;

(3) Whether Rule 7(3A) of the RCA 1994 imposes a higher threshold on parties seeking to introduce fresh or additional evidence by requiring proof of a 'determining influence', which exceeds the 'important influence' threshold established in *Ladd v Marshall*;

(4) At the leave stage for judicial review proceedings, whether the burden of proof regarding the existence of disputed fresh or additional evidence lies with the Attorney General (AG) in his capacity when acting solely under Order 53 Rule 3(3) of the Rules of Court 2012;

(5) At the leave stage for Judicial Review proceedings, whether there is any legal obligation to compel any authority to confirm the existence of and provide copies of documents to the Applicant, particularly with respect to the AG, who is acting solely in his capacity under Order 53 Rule 3(3) of the Rules of Court 2012;

(6) At the leave stage for Judicial Review proceedings, whether there is a distinction in the role and obligations of the Attorney General when acting solely in his capacity under Order 53 Rule 3(3) of the Rules of Court 2012 as opposed to when acting as a Respondent, particularly in the context of the duty to confirm the existence and/or admissibility of fresh or additional evidence. If such a distinction exists, what is the dividing line between these two roles?

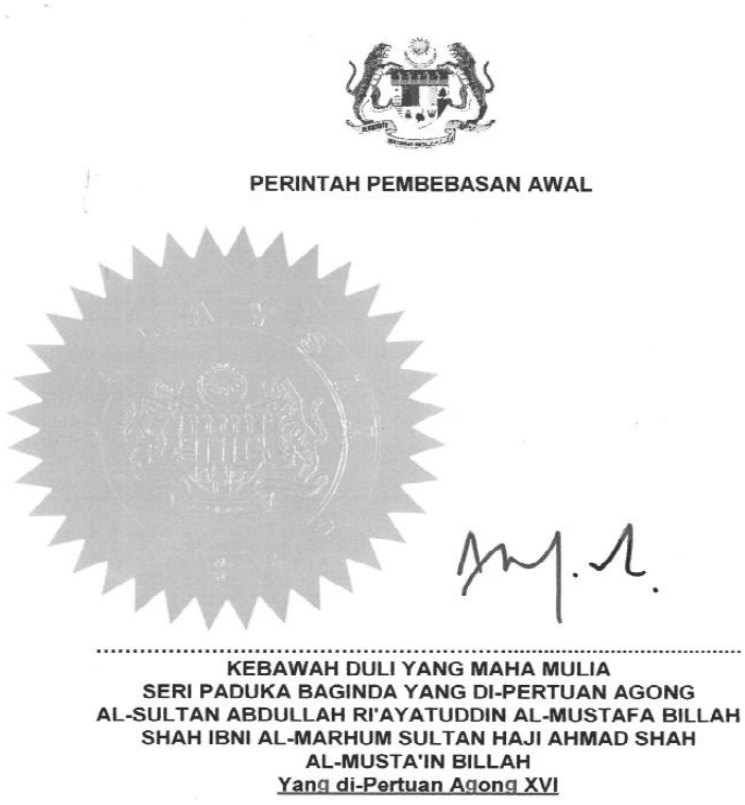
(7) In Judicial Review proceedings, whether the Applicant may introduce fresh or additional evidence that would have the legal effect of directly or indirectly challenging the decision of the Pardons Board.

[3] The proposed questions 1, 2, 3 and 7 relate to the issue of admission of fresh or additional evidence. While the proposed questions 4, 5 and 6 relate to the issue of the role of the Attorney General in judicial review proceedings.

BACKGROUND FACTS

[4] The respondent is a serving prisoner who had applied for a complete/full pardon from His Majesty Seri Paduka Baginda Yang di-Pertuan Agong XVI ('the YDPA XVI') on 1 September 2022 pursuant to art 42 of the Federal Constitution, after exhausting his legal rights until the Federal Court. The Federal Court had affirmed his conviction and sentence of 12 years of imprisonment and fined RM210m for the SRC case on 8 December 2021.

[5] On 2 February 2024, the Pardons Board under the purview of the Minister in the Prime Minister's Department (Law and Institutional Reform) and Director General of Legal Affairs Division of the Prime Minister's Department announced by way of media statement after considering the views and advice of the Pardons Board, that the YDPA had granted the respondent a pardon by reducing the imprisonment sentence to six years and a fine reduced to RM50m ('pardons order') which is as reproduced below:



PERINTAH PEMBEBASAN AWAL

KEBAWAH DULI YANG MAHA MULIA
SERI PADUKA BAGINDA YANG DI-PERTUAN AGONG
AL-SULTAN ABDULLAH RI'AYATUDDIN AL-MUSTAFA BILLAH
SHAH IBNI AL-MARHUM SULTAN HAJI AHMAD SHAH
AL-MUSTA'IN BILLAH
Yang di-Pertuan Agong XVI

Kepada:

Ketua Pengarah Penjara Malaysia
dan Sekalian Yang Menerima Surat Ini;

BAHAWASANYA dalam perbicaraan Wilayah Persekutuan (Perbicaraan Jenayah No.: WA-45-2-7/2018, Perbicaraan Jenayah No.: WA-45-3-7/2018 dan Perbicaraan Jenayah No.: WA-45-5-8/2018, di hadapan Mahkamah Tinggi Malaya di Kuala Lumpur, **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK (NO. K/P:530723-06-5165)** telah dituduh dengan kesalahan di bawah seksyen 23 dan boleh dihukum di bawah seksyen 24 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694], kesalahan di bawah seksyen 409 Kanun Keseksaan [Akta 574] dan boleh dihukum dengan seksyen yang sama, kesalahan di bawah seksyen 4(1)(b) dan boleh dihukum di bawah seksyen 4(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] dan telah dijatuhkan hukuman penjara secara kumulatif selama tujuh belas (17) tahun mulai daripada tarikh keputusan Mahkamah Persekutuan iaitu pada 22 Ogos 2022.

BAHAWASANYA pada 28 Julai 2020, di hadapan Mahkamah Tinggi Kuala Lumpur **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK** telah didapati bersalah terhadap semua pertuduhan di dalam ketiga-tiga perbicaraan jenayah tersebut dan memerintahkan kesemua hukuman dijalankan secara serentak. Di hadapan Mahkamah Tinggi Kuala Lumpur membenarkan penangguhan hukuman penjara dan denda tersebut

A

BAHAWASANYA pada 8 Disember 2021, di hadapan Mahkamah Rayuan telah menolak rayuan **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK** dan mengekalkan keputusan Mahkamah Tinggi.

B

BAHAWASANYA pada 23 Ogos 2022, di hadapan Mahkamah Persekutuan telah menolak rayuan **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK** dan mengesahkan keputusan Mahkamah Tinggi seperti mana yang dikekalkan oleh Mahkamah Rayuan.

C

D

BAHAWASANYA dalam perbicaraan Wilayah Persekutuan (Perbicaraan Jenayah No.: WA-45-2-7/2018), **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK** juga ingkar membayar denda sebanyak RM210,000,000.00, maka secara kumulatif hukuman penjara yang dijatuhkan adalah selama tujuh belas (17) tahun mulai daripada tarikh keputusan Mahkamah Persekutuan iaitu pada 22 Ogos 2022 ke atas **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK**.

E

F

BAHAWASANYA Lembaga Pengampunan bagi Wilayah-Wilayah Persekutuan Kuala Lumpur, Labuan dan Putrajaya kali ke-61 melalui Perkara 42 di bawah Perlembagaan Persekutuan pada 29 Januari 2024 menimbang hukuman banduan dan menasihatkan Seri Paduka Baginda Yang di-Pertuan Agong supaya banduan **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK** meneruskan baki hukuman;

G

H

I

DAN BAHAWASANYA adalah munasabah pada hemat Beta, belas kasihan patut diberi kepada **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK**;

MAKA, OLEH YANG DEMIKIAN, Beta, Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah ibni Almarhum Sultan Haji Ahmad Shah Al-Musta'in Billah, Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong XVI, pada menjalankan kuasa yang terletakhak pada Beta oleh Perkara 42 Perlembagaan Persekutuan dan semua kuasa lain yang membolehkan bagi maksud itu ADALAH DENGAN INI MEMERINTAHKAN bahawa **DATO' SRI NAJIB BIN TUN HAJI ABDUL RAZAK dibebaskan pada tarikh pembebasan awal iaitu 23 Ogos 2028 dan denda dikurangkan kepada RM50,000,000.00. Sekiranya denda tidak dibayar, tempoh penjara bagi DATO' SRI NAJIB BIN TUN HAJI ABDUL RAZAK ditambah selama setahun dan tarikh pembebasan adalah pada 23 Ogos 2029.**

PADA MENYAKSIKAN YANG TERSEBUT DI ATAS Beta telah menurunkan tandatangan dan cop Mohor Beta pada 29 JAN 2024

DENGAN TITAH PERINTAH BAGINDA,

(YB DR. ZALIHA MUSTAFA)
Menteri di Jabatan Perdana Menteri
(Wilayah Persekutuan)

[6] On 12 February 2024, the respondent claimed to have received clear and reliable information that in addition to the pardons order dated 29 January 2024, the YDPA had issued a supplementary order ('the addendum order') which states that the respondent is to serve a reduced sentence of his imprisonment under condition of home arrest, instead of being confined in Kajang Prison or any other prison.

[7] The respondent instructed his solicitors to confirm the details of the addendum order with the learned Attorney General ('AG') by way of a letter dated 14 February 2024 which was copied to the Prime Minister and the Deputy Prime Minister.

[8] By 22 March 2024, the matter had reached the Minister of Home Affairs regarding, inter alia, the existence of the addendum order. The matter was also brought to the attention of the Pardons Board for the Territories of Kuala Lumpur, Labuan and Putrajaya, as well as the Minister in the Prime Minister's Department (Law and Institutional Reform) and Director General of Legal Affairs Division in the Prime Minister's Department on 29 March 2024.

[9] Thereafter, in April 2024 the respondent filed an application for leave for judicial review under O 53 of the Rules of Court 2012 seeking for mandamus orders to compel the appellant to do the following acts:

(a) to confirm the existence of the addendum order dated 29 January 2024 which provided that the respondent is to serve a reduced term of imprisonment under house arrest;

(b) to provide the respondent with a copy of the pardons order and the addendum order dated 29 January 2024; and

(c) consequently, the respondent is to serve the remainder of the prison sentence under house arrest at his residence in Kuala Lumpur.

[10] The learned AG appeared and opposed the judicial review application premised on the ground that the pre-requisites for mandamus were not fulfilled and the test for leave for judicial review was not satisfied.

[11] The learned High Court judge dismissed the application for leave for judicial review on 3 July 2024 premised essentially on, inter alia:

(a) the source (of the information contained in the affidavits relied upon by the respondent), Tengku Zafrul did not affirm any affidavit on behalf of the respondent. There was no explanation as to why this is so. The source was available but was not used. The application at the leave stage was an ex parte application and the test was to peruse the material produced by

the applicant then (who is the respondent in the present appeal) to see whether an arguable case had been made out, for the matter to proceed to the substantive stage of the hearing of the judicial review application;

(b) Tengku Zafrul sought to file an affidavit to correct some inaccuracies in the affidavit of Ahmad Zahid Hamidi, however it was objected to, by the respondent. The reliability of the hearsay evidence in the affidavits could not be judged and therefore no weight was placed on the said affidavits. It was held by the learned High Court judge that there was no arguable case for further investigation at the substantive stage; and

(c) the criteria for the granting of mandamus was not met. The respondent did not show any failure on the part of the appellant, in particular the Pardons Board to perform the statutory duties imposed upon them in law.

[12] On 19 December 2024, the respondent's solicitors also requested for the original copy of the pardons order from the Kajang Prison.

COURT OF APPEAL PROCEEDINGS

[13] Aggrieved by the decision of the High Court, the respondent appealed to the Court of Appeal. Two days before the hearing at the Court of Appeal, on 3 December 2024, the respondent filed a notice of motion to introduce new evidence, which amongst others, included the addendum order (encl 26).

[14] The addendum order that the respondent sought to be admitted as new evidence reads as follows:

(*the remainder of this page is intentionally left blank*)

Bismillahirrahma Nirrahim
Qaullahul – Haq

السلام عليكم ورحمة الله وبركاته

Waraqatul Ikhlas Watah Fatul Akhyar iaitu daripada Beta, Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah ibni Almarhum Sultan Haji Ahmad Shah Al-Musta'in Billah, Yang di-Pertuan Agong Malaysia.

Mudah-mudahan barang diwasalkan oleh Tuhan Seru Sekalian Alam ke Majlis Yang Berbahagia Datuk Ahmad Terrirudin bin Mohd Salleh, Peguam Negara Malaysia yang berada pada masa ini di Pejabat Peguam Negara, Putrajaya dengan beberapa selamat dan sejahteranya.

Waba'dah Ehwal, Beta dengan ini menitahkan sebagai tambahan kepada keputusan Beta berhubung Banduan, Dato' Sri Mohd Najib bin Tun Haji Abdul Razak (530723-06-5165) pada Mesyuarat Lembaga Pengampunan Wilayah-wilayah Persekutuan Kuala Lumpur, Labuan dan dan Putrajaya kali ke-61 pada hari Isnin, 29 Januari 2024 bersamaan 17 Rejab 1445 Hijrah supaya **Banduan, Dato' Sri Mohd Najib bin Tun Haji Abdul Razak (530723-06-5165) menjalani baki hukuman menerusi penahanan dalam rumah (*House Arrest*).**

Demikianlah sahaja Beta maklumkan. Beta dan Raja Permaisuri Agong berdoa kehadrat Allah S.W.T. semoga Yang Berbahagia Datuk, Yang Berbahagia Datin serta rakyat Beta keseluruhannya sentiasa dalam perlindungan serta rahmat-Nya.

Wabillahitaufiq Walhidayah, Wassalamualaikum Warahmatullahi Wabarakatuh.

Termaktub di Istana Negara
Jalan Tuanku Abdul Halim
50480 KUALA LUMPUR

Pada 29 Januari 2024M
17 Rejab 1445H

[15] Subsequently, the respondent filed another notice of motion to amend encl 26 and include additional new evidence (encl 50). Enclosure 50 essentially seeks the court to grant leave to the respondent to adduce additional evidence (in the event that leave is required) in the form of the affidavits by Mohamad Nizar dated 2 December 2024 and the affidavit No 2 dated 5 January 2025, the addendum order and a protective order to safeguard the confidentiality of the additional evidence.

[16] On 6 January 2025, the Court of Appeal by a majority, allowed the appeal by allowing encl 26 but dismissed encl 50.

[17] The grounds of the majority decision of the Court of Appeal held that the fact that there is no rebuttal affidavit from the appellant challenging the existence and the authenticity of the addendum is rather compelling. The majority applied the principle in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281. Whereas the minority decision held that r 7(3A) of the Rules of Court of Appeal 1994 codifies the principle of *Ladd v Marshall* and that the respondent failed to meet one of the elements of *Ladd v Marshall*, namely the failure to exercise reasonable diligence in obtaining the new evidence, ie the addendum order. However, the minority agree that the new evidence, if true would have a determining influence on the decision of the High Court. It is incumbent for the respondent to fulfill all the elements of *Ladd v Marshall* to admit the new evidence.

[18] The Court of Appeal (by the majority decision) allowed the appeal, which means leave is granted for the judicial review application and allowed the admission of the addendum order. Consequently, the Court of Appeal directed the matter to be remitted to the High Court for the hearing of the substantive judicial review application before another High Court judge.

ANALYSIS AND FINDINGS OF THIS COURT

[19] Before we proceed to answer the questions posed, it is pertinent to note that in the midst of submissions by the learned AG before us, there was a concession made by the learned AG that the addendum order exists.

[20] This concession has a great impact on the questions posed before us, in particular the questions relating to the existence of the disputed new evidence. With this concession, questions 4, 5 and 6 are no longer relevant and are academic. Hence, we will not deal with those questions here.

[21] Be that as it may, although there was a concession with regards to the existence of the purported addendum order, we need to emphasise that:

(a) firstly, it is not our judgment herein that the addendum order is part of the pardons order and neither are we saying that it is not. It is premature at this stage for this court to make such a determination;

(b) secondly, despite the existence of the addendum order, that by itself, does not translate into automatic admissibility of the same. The respondent still has to satisfy the rule and criteria as to the admission of the addendum order as new evidence, which we will address accordingly in our judgment;

(c) thirdly, the existence of the addendum order does not automatically render the addendum order as valid. This issue would have to be determined at the substantive hearing in the judicial review proceedings,

A if leave is granted. In this context art 42 of the Federal Constitution takes center stage, namely:

(i) art 42 of the Federal Constitution governs the royal prerogative of mercy, whereby the Yang di-Pertuan Agong ('YDPA') is empowered to grant pardons, reprieves, and respites in respect of all offences committed in the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya;

(ii) the exercise of such clemency by the YDPA is not absolute. It is to be carried out in accordance with the constitutional limits prescribed by art 42, particularly through the framework of advice and procedure embedded therein;

(iii) pursuant to art 42(4)(b), the YDPA is required to act on the considered advice of the Pardons Board for the Federal Territories. His function in the clemency process is therefore inextricably tied to the deliberations and recommendations made by the Board established for that purpose;

(iv) the Pardons Board for the Federal Territory of Kuala Lumpur is constituted under art 42(5) of the Federal Constitution, and comprises the learned AG, the Prime Minister, and three other members appointed by the YDPA;

(v) art 42(8) further mandates that any meeting of the Pardons Board must be held in the presence of the YDPA, who shall preside over its proceedings. This requirement is both procedural and constitutional in nature; and

(vi) any failure to adhere strictly to the procedural safeguards and substantive requirements under art 42 will render the entire clemency process susceptible to constitutional challenge and judicial review.

(d) fourthly, on the issue of justiciability, that is also to be addressed and determined at the substantive hearing, if leave is granted.

[22] The arguments and the issues raised in the appeals before us are to determine whether leave ought to be granted for the judicial review application.

Questions 1, 2, 3, and 7

[23] We will now address the remaining questions, which are questions 1, 2, 3, and 7. These questions relate to the admission of new evidence at the appellate level.

[24] The applicable statutory provision with regards to the admission of new evidence at the appellate level is r 7 of the Courts of Appeal Rules 1994 ('the RCA 1994') which provides that:

> (1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or Commissioner.
>
> (2) Such *further evidence may be given without leave on interlocutory applications*, or in the case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, *shall be admitted on special grounds only*, and not without leave of the Court.
>
> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that —
>
> (a) at the hearing before the High Court or the subordinate court, as the case may be, *the new evidence was not available* to the party seeking to use it, *or that reasonable diligence* would not have made it so available; and
>
> (b) the new evidence, *if true*, would have had or would have been likely to *have had a determining influence* upon the decision of the High Court or the subordinate court, as the case may be.

[25] Rule 7(3A) of the RCA 1994 is substantially identical to s 69(3) of the Courts of Judicature Act 1964 with the exception of the provision of r 7(3A) which is not present in s 69(3) of the Courts of Judicature Act 1964.

[26] The majority panel of the Court of Appeal erred when it relied on O 55 r 7 of the Rules of Court 2012 as being the principles applicable to adduce new evidence at the Court of Appeal (see para 20 of the majority grounds of judgment). Order 55 r 7 of the ROC 2012 is expressly confined to proceedings before the High Court, in the context of appeals from the subordinate courts to the High Court. It is not applicable to an application to adduce fresh or new evidence at the appellate stage in the Court of Appeal and the Federal Court.

Whether leave is required to introduce new evidence at the appeal stage

[27] Parties dispute as to whether this application for leave in a judicial review application is interlocutory in nature, in the context of r 7(2) of the RCA 1994. The said rule provides that 'such further evidence may be given without leave in interlocutory applications ...'.

[28] The majority grounds of judgment of the Court of Appeal at paras [54] and [55] held that, appeal arising from the dismissal of leave for judicial review application, is interlocutory in nature. Therefore, the application for leave in a judicial review application falls squarely within the provisions of s 69(2) of the Courts of Judicature Act 1964 and r 7(2) of the RCA 1994. Hence, the addendum order which was sought to be adduced as new evidence after the decision of the learned High Court judge need not require leave from the court.

[29] The minority held otherwise, that although a leave application for the judicial review application is interlocutory in nature, a refusal of leave has a final effect as it prevents the applicant from proceedings to the hearing of the substantive judicial review application. The substantive judicial review hearing is what will determine the final rights or obligations. The leave stage only filters out unmeritorious cases. However, when the High Court dismissed the application for leave, that finally disposes of the entire judicial review proceedings, which, had determined the rights of the parties, thus rendering it final in effect and thus is not interlocutory (see paras [45]–[47] of the minority judgment). The minority judgment further added that:

> [48] ... the affidavits filed in support of the leave application will be the same affidavit used for the substantive application (see O 53 r 4(2)). Order 53 r 3 (2) of the ROC 2012 provides that an application for leave must be 'supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on'. Therefore, as opposed to O 41 r 5(2) of the ROC 2012, the affidavits affirmed for the purpose of judicial review application cannot be based on hearsay evidence.

[30] The learned High Court judge and the appellant referred to the decision of the Supreme Court, in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 at p 447–449, which echoed the minority view on this matter, when it ruled as follows:

> We are supported in our views regarding the requirements of the application for leave and the affidavit in support thereof under O53 r 1(2) by the following passages in the book *Judicial Review* by Michael Supperstone QC and James Goudie QC which we thoroughly approve of ... On the last question whether hearsay material may be referred to in the affidavit in support of the application for leave, the learned authors have this to say at p 357 para 2, and we agree:
>
> > It is not entirely clear whether the affidavit in support of the application for leave should be regarded as interlocutory in character or otherwise. *This has a possible significance in terms of whether hearsay material may strictly be admitted*. The application for leave itself is undoubtedly interlocutory; however, if leave is granted, the affidavit in support of the leave application is served together with the notice of motion and forms the first basis of the applicant's case in the substantive application. (Emphasis added.)

[31] The appellant in relying on the case of *Tuan Hj Sarip Hamid*, argued that, although it is trite that, an application for leave to commence judicial review proceedings under O 53 of the ROC 2012 is interlocutory in nature, the affidavit verifying facts in support thereof may not necessarily be so. A

[32] Our analysis on whether the application for leave for judicial review in this case is interlocutory in nature is explained in the following paragraphs. B

[33] Generally speaking, interlocutory applications do not determine the rights of the parties. Even after disposal of an interlocutory applications, the main suit which is to determine the rights of the parties still persists. C

[34] What we have before us is an application for leave for judicial review application under O 53 r 3 of the ROC 2012. The application for leave here is an application to determine the right of the applicant to seek judicial review. D

[35] Normally, a party would initiate an action in court for determination of his rights or his claim. This determination by the courts would be regulated by the rules of evidence and admissibility at the full hearing. In a normal civil suit there may be interlocutory applications filed with affidavits in support. In such situation, O 41 r 5(2) of the ROC 2012 applies to affidavits used in interlocutory proceedings, which are preliminary or temporary steps taken during a lawsuit before final judgment which disposes parties' rights. This rule allows the flexibility for the inclusion of 'statements of belief, providing the source and grounds for that belief'. E F

[36] However, for applications or matters before the court which are *not interlocutory in nature*, such type of evidence is not admissible. In other words although the application is interlocutory in form, they are not interlocutory within the meaning of O 41 r 5(2) of the ROC 2012 as regards evidence because they decide on the rights of the parties which are regulated by the rules of evidence and admissibility. G

[37] We have asked parties whether there is an authority directly on point that decided that the application for leave in a judicial review is an interlocutory proceeding or vice versa, to which the answer is in the negative. In the course of our research, we found a decision of the English Court of Appeal, which had the occasion to deal with this similar issue in *Gilbert v Endean* (1878) 9 Ch D 259 where Cotton LJ at pp 268–269 held: H I

> I agree in the opinion expressed by the other members of the Court, and I should add nothing but for the way under which the case comes before us. *It comes to us on motion, but though it comes before us in that form, we have to decide the ultimate rights of parties, and in my opinion, as regards evidence, it ought to be dealt with just in the same way as if a bill had been filed. I am now adverting … to the question whether the*

> *rule that on interlocutory applications the Court may act upon evidence given on the witness information and belief applies to the present case. But for the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties*, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of parties ... *many of the cases which a re brought before the Court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties and whatever the form may be in which such questions are brought before the Court, in my opinion the evidence must be regulated by ordinary rules, and must be such as would be admissible at the hearing of the cause*. (Emphasis added.)

[38] Later, in another English Court of Appeal case in *Rossage v Rossage and others* [1960] 1 WLR 249, at p 251, which concerned divorce proceedings, where years after the divorce, the father made an application to suspend the right of access of the mother to the child of the marriage. The application was supported by certain affidavits consisting largely of scandalous imputations against the mother premised upon hearsay and irrelevant matters. The mother applied to have these affidavits expunged from the file as being scandalous and irrelevant, and in breach of the O 38 r 3 of the Rules of the Supreme Court ('the RSC') which provides that:

> Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove ... *Provided* that on interlocutory proceedings ... an affidavit may contain statements of information and belief, with the sources and grounds thereof.

[39] The husband contended, inter alia, that as the proceeding was interlocutory, by virtue of the proviso to the then O 38 r 3 of the SCR which provided that on interlocutory proceedings, an affidavit might contain statements of information and belief, with the sources and grounds thereof. Barnard J refused the application on grounds that he could put irrelevant matters out of his mind. However, it was allowed upon appeal and the affidavits were struck out. In the course of the judgment of the Court of Appeal, Hobson LJ held that for the purpose of O 38, the proceeding was not an interlocutory proceeding, where an issue has to be determined. Thus, the affidavit of the husband which contained materials, much of which were irrelevant and pure hearsay which the court could not take into account in the form in which it stood. In dealing with O 38 r 3, the court referred to the case of *Gilbert v Endean* which draws *a distinction between interlocutory proceedings generally and interlocutory proceedings where an issue has to be determined*, as in this case, it is to suspend the mother's right of access to the child of marriage. The father's application to suspend the right of access of the mother to the child of the marriage was held by the Court of Appeal as not an interlocutory proceeding

(although interlocutory in form) as it was an application to decide on the rights of parties.

[40] The proviso of the English RSC O 38 r 3 is in *pari materia* with our O 41 r 5(2) of the ROC 2012.

[41] Coming back to the matter before us, judicial review application is unlike the usual civil suit where in the former there is an application for leave before the applicant can proceed to the substantive hearing of the judicial review application. In an application for leave for judicial review application, in the event there is a dismissal of the leave application, the applicant's rights would be determined to its finality. There will be no more hearing of the substantive judicial review application. Although the application for leave in a judicial review proceedings is the initial step in the motion towards the hearing of the substantive judicial review application, it is not an interlocutory proceeding/application as the rights of the applicant may be determined at the leave stage, as in the present appeal.

[42] The Singapore Court of Appeal's decision in *OpenNet Pte Ltd v Info-communications Development Authority of Singapore* [2013] 2 SLR 880 is the first Court of Appeal Singapore's pronouncement on this subject and interprets the phrase 'interlocutory application' in the Fifth Schedule para (e)(iv) of the Supreme Court of Judicature Act 1969 ('the SCJA'). The issue before the Court of Appeal then was, whether the appellant therein required leave to appeal against an order made by the High Court judge refusing leave to the appellant to commence judicial review proceedings. It was argued by the respondent, inter alia, that the appellant required leave to appeal because the application for leave to commence judicial review was an 'interlocutory application' under sub-para (e) of the Fifth Schedule of the SCJA. The respondent further argued that, an application for leave was 'interlocutory' in nature because it was 'simply a preliminary step to the substantive application for judicial review'; it may be made by ex parte originating summons without the respondent being heard; and the appellant had itself proceeded on the basis that the application was 'interlocutory' in nature because its affidavits in support of the application for leave stated that they contained statements of information or belief, which were admissible under O 41 r 5 of the Rules of Court for 'interlocutory proceedings'. The Court of Appeal held that as the refusal of leave meant that the substantive rights of the parties had been determined and had an absolute end, thus, the application for leave to commence judicial review here was not an 'interlocutory application' under sub-para (e) of the Fifth Schedule of the SJCA. Accordingly, no leave to appeal was required before the appellant filed an appeal against the decision of the High Court refusing leave to commence judicial review proceedings.

[43] *OpenNet Pte Ltd v Info-communications Development Authority of Singapore* was however decided before the amendment to the SCJA which took effect, on 1 January 2019. Under the current legislative framework, leave of court is required to adduce further evidence in all appeals (including interlocutory matters), in respect of matters occurring before the date of decision from which the appeal was sought. In this regard, s 59(4) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ('the SCJA') states that:

> Except as provided in subsection (5), such further evidence may be given to the Court of Appeal only with the permission of the Court of Appeal and on special grounds.

Section 59(5) of the SCJA states that:

> Such further evidence may be given to the Court of Appeal without permission if the evidence relates to matters occurring after the date of the decision appealed against.

Recent changes have also been made to the detailed appellate processes now enshrined in the new Singaporean Rules of Court ('Singaporean ROC 2021') to achieve cost-effectiveness and the efficient use of court resources.

Presently, O 18 r 8(6) of the Singaporean ROC 2021 provides that:

> Subject to any written law, the appellate Court has power to receive further evidence, either by oral examination in court, by affidavit, by deposition taken before an examiner, or in any other manner as the appellate Court may allow, but *no such further evidence (other than evidence relating to matters occurring after the date of the decision appealed against) may be given except on special grounds*.

[44] This differs from the position under s 69(3) of our CJA where the twin requirements of leave of court and special grounds are imposed in respect of further evidence for appeals from a judgment, trial or hearing on the merits. As has been noted above, in Malaysia, further evidence may be given without leave of court in interlocutory applications at the Court of Appeal (see: s 69(2) of our CJA and r 7(2) of the RCA 1994).

[45] Similarly, the learned High Court judge had distinguished (at para [36] in His Lordship's judgment) on the role of the affidavits in support of the application for leave in judicial review application and the substantive application for judicial review:

> [36] In judicial review applications, as opposed to other interlocutory applications, the distinguishing factor is that the affidavit verifying facts is the same affidavit used for the substantive application. Thus according to Tuan Sarip Hamid, while the leave application for review is interlocutory in character, the affidavit may require direct knowledge depending on the nature of the subject matter ....

[46] In this regard the minority decision in the Court of Appeal is not far off from what we have elucidated on the issue of the application for leave in the present appeal, namely, that, the application for leave in the judicial review proceedings is not an interlocutory proceeding for the purpose of r 7(2) of the RCA 1994, and hence leave is required. Therefore, although the application for leave for judicial review is interlocutory in form, it is an application to decide on the rights of the parties, hence as regards evidence it ought not be regarded as an interlocutory proceeding within the meaning of O 41 r 5(2) of the ROC 2012 (see *Gilbert v Endean*, *Rossage v Rossage*, *Tuan Hj Sarip Hamid*).

[47] It should also be noted that r 7(2) of the RCA 1994 states that the fresh evidence 'may be given without leave'. We think it significant that in r 7(2) of the RCA 1994, the word 'may' has used. This suggests that the court retains a discretion to allow for such evidence to be adduced, but this does not mean the court must invariably allow for such evidence to be adduced without leave, without some kind of filtering mechanism.

[48] In our opinion, such a filtering mechanism is important as a means of preventing the appellate courts from being flooded with frivolous applications to adduce fresh evidence, thus taking up precious judicial time. If such application were not subject to some measure of judicial control, it would upend finality in litigation which is a pillar of our system of justice. Of course, in considering applications under r 7(2) of the RCA 1994, the court also balances the interests of justice depending on the particular circumstances of the appeal before it. As such, it is our opinion that the presence of the word 'may' means that the appellate court, may, in a fit and proper case, decide against allowing evidence which falls under r 7(2) of the RCA 1994 from being adduced.

[49] In the instant case, the additional evidence application No 1 via encl 26 sought to adduce Mohamad Nizar's first affidavit dated 2 December 2024 and the addendum order, dated 29 January 2024. This means that Mohamad Nizar's first affidavit was after the decision of the High Court which was on 3 July 2024 whereas the addendum order was in existence even before the application for leave to commence for judicial review which was on 1 April 2024.

[50] As such, Mohamad Nizar's first affidavit falls under matters which occurred subsequent to the date of the decision appealed against, while the addendum order existed before the decision of the High Court. Thus, Mohamad Nizar's first affidavit may be adduced without leave of court but leave of court is required to adduce the addendum order.

The introduction of new evidence at the appellate level in Malaysia and other jurisdictions

[51] Rule 7(3A) of the RCA 1994 was introduced in 1998 through PU(A) 380/1998. Prior to the introduction of r 7(3A) of the RCA 1994, the courts applied the *Ladd v Marshall* principle of admitting fresh and additional evidence at the appellate level, where the applicant must show:

(a) the evidence could not have been obtained with *reasonable diligence* for use at the trial;

(b) the evidence must be such that, *if given*, it would probably have an *important influence* on the result of the case, although it need not be decisive; and

(c) the evidence must be such as is presumably to be believed, or in other words, *it must be apparently credible*, although it need not be incontrovertible.

[52] Pre-r 7(3A) of the RCA 1994 saw the decision of *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 which applied the *Ladd Marshall* principle of admitting fresh evidence at the appellate level. The application for the admission of fresh evidence was dismissed as the appellant has not shown that the evidence which was sought to be adduced could not have been obtained with reasonable diligence for use at the trial.

[53] Subsequent case of *Chai Yen v Bank of America National Trust & Savings Association* [1980] 2 MLJ 142, where the application was dismissed as the applicant could not have satisfied the first requirement of *Ladd v Marshall*, namely the evidence could not have been obtained with reasonable diligence for use at the trial. Failure to satisfy the first requirement was sufficient for the dismissal of the application. Further the court held that the evidence sought to be adduced, namely the guarantee, was of no relevance to the application.

[54] As for post r 7(3A) of the RCA 1994, the Federal Court in *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2025] 2 MLJ 744 has the occasion to deal with r 7(3A) of the RCA 1994. The appellant, V Medical Services (M) Sdn Bhd ('the company') sought a Fortuna injunction to restrain Swissray from bringing a winding up petition on the grounds that there subsisted a dispute in relation to the debt which comprised the subject matter of the winding up petition.

[55] The primary issue confronting the Federal Court in *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Sdn Bhd* was the test to be adopted when a defendant in a winding up petition, disputes the existence of the debt which

comprises the basis for the winding up petition, but the dispute relating to such debt falls within the scope of an arbitration agreement.

[56] Just before the first hearing date at the Federal Court, the company applied to adduce fresh evidence, namely the evidence of Mr Thawichai, Swissray's previous Sales and Marketing Director who had personally dealt with the company as Swissray's representative, in relation to all crucial communications with the company, particularly the settlement negotiations. Mr Thawichai had left Swissray's employment sometime in 31 October 2018 and the company had only been able to locate and contact him after the hearing in the Court of Appeal.

[57] The Federal Court applied r 7(3A) of the RCA vide r 3 of the Rules of the Federal Court 1995, and opined that r 7(3A) 'encapsulates' the test in *Ladd v Marshall*. The Federal Court applied the criteria for the fresh evidence to be admitted, namely the fresh evidence:

(a) could not have been located or obtained with reasonable diligence prior to the hearing of the appeal;

(b) is genuine or authentic and not patently unbelievable or doubtful; and

(c) was likely to be of determinative influence in the appeal (para [78] of the judgment).

The Federal Court allowed for the evidence to be admitted.

[58] This Court in *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Sdn Bhd* described r 7(3A) of the RCA 1994 as an *encapsulation* of the test in *Ladd v Marshall* before proceeding to apply the test to the facts of the case. The minority decision of the Court of Appeal in our present appeal held that r 7(3A) of the RCA 1994 *codifies* the principle of *Ladd v Marshall* (see para 51 of the minority decision of the Court of Appeal). Question 1 in our present appeal seeks a determination from this court whether the principles established in *Ladd v Marshall* have been *codified* or merely *reflected* in r 7(3A) of the RCA 1994 which we will do at the end of this judgment.

[59] In the UK, the *Ladd v Marshall* criteria were not expressly codified in any written law, but they serve as useful interpretive common law tools when judges give legal effect to provisions such as the English Civil Procedure Rules ('the CPR') in r 52.21(2) and Practice Direction ('PD') of the 5.11 UK Supreme Court Rules 2024.

[60] On the issue of reasonable diligence, from our examination of the cases in the UK, if the said fresh evidence could have been obtained at or before trial, it is unlikely to be admitted on appeal (see the Court of Appeal England &

Wales judgment in *Hertfordshire Investments Ltd v Bubb and another* [2000] 1 WLR 2318). The court assesses whether the party had taken reasonable steps to obtain the evidence — whether the evidence was discoverable with reasonable efforts or within the party's control. In light of the finality of proceedings, fresh evidence should not be used as a litigation tactic, allowing parties to wait for the outcome of the trial and, if unsuccessful, introduce new evidence on appeal (see *Al-Sadeq v Dechert LLP and others* [2024] EWCA Civ 28). The appellate court must also meticulously scrutinise the case timeline to determine if reasonable diligence was exercised in obtaining the evidence (*Al-Koronky and another v Time-Life Entertainment Group Ltd and another* [2006] EWCA Civ 1123).

[61] On the issue of 'important influence', English case law suggests that courts will not admit fresh evidence on appeal unless its admission brings a material change to the trial's outcome (see: *Al-Koronky*; *Singh and ors v Habib & Anr* [2011] EWCA Civ 599; *R (Al Siri) v Secretary of State for the Home Department* [2021] EWCA Civ 113). Fresh evidence will only be admitted in exceptional situations:

(a) when the integrity of the trial has been compromised (*Hamilton v Al Fayed* [2000] All ER (D) 2450[2001] EMLR 15); or

(b) the trial has been tainted with fraud/conspiracy/bad faith (mala fide) (*Singh and ors v Habib & Anr* [2011] EWCA Civ 599).

[62] Depending on the context, English courts are generally more lenient in admitting fresh evidence in child care proceedings (*Re E (children: reopening findings of fact)* [2020] 2 All ER 539)) but prioritise the finality of proceedings in judicial review cases (see *R (Al Siri)*).

[63] The credibility criterion in *Ladd v Marshall* is assessed on a case-by-case basis if it is relevant to the issue on appeal. This is the approach consistently taken by the English authorities:

(a) *Hertfordshire Investments Ltd*: The Court of Appeal disposed the appeal by considering only the reasonable diligence criterion in *Ladd v Marshall*;

(b) *Hamilton v Al Fayed*: The Court of Appeal based its reasoning on the credibility criterion when it was alleged that the integrity of trial was compromised (ie there was new evidence to challenge the credibility of trial witness). Similar to the UK Supreme Court approach in *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] 2 AC 304 where the appeal was disposed of based on the credibility criterion in *Ladd v Marshall*; and

(c) *Terluk v Berezovsky* [2011] EWCA Civ 1534 and *Al-Sadeq v Dechert LLP and others* [2024] EWCA Civ 28: The credibility criterion was assessed together with the reasonable diligence criterion in *Ladd v Marshall.*

[64] Credibility is a question of fact for the appellate court to assess when deciding whether to admit fresh evidence. Courts are entitled to assess the credibility of the fresh evidence against other form of corroborating evidence at trial, such as oral testimonies by witnesses and other form of documentary evidence. This was the approach taken in the case of *Terluk, Al-Sadeq v Dechert LLP* and *Welwyn Hatfield Borough Council.*

[65] If the said fresh evidence could have and should have been obtained at trial, its credibility may be called into question if it is subsequently adduced on appeal. This is because the submission of fresh evidence should not be used as a litigation tactic and the opposing party should be given sufficient time to verify its accuracy, credibility and reliability during trial preparation (see: *Al-Koronky v Time Life Entertainment Group* and *Terluk v Berezovsky*).

[66] In Singapore, the extent to which the principles in *Ladd v Marshall* are applied in an appeal depend on the nature of the proceedings in question. Even after considering the nature of the proceedings below, the court retains an overarching discretion to act as the interests of justice require. Thus, the conditions in *Ladd v Marshall* may be relaxed or applied more strictly in accordance with the circumstances of a particular matter before the court, to reach a just and common-sense outcome.

[67] In Australia, while some of the Australian courts do not expressly refer to *Ladd v Marshall*, the essence of the test they apply remains the same.

THE DIFFERENCES BETWEEN THE ELEMENTS IN LADD V MARSHALL AND R 7(3A) OF THE RCA 1994

[68] This aspect is relevant to answer questions 1, 2, 3 and 7 posed.

Availability/reasonable diligence

[69] The first condition in *Ladd v Marshall* is that the fresh evidence may be admitted if the applicant can satisfy the court that it *could not have been obtained with reasonable diligence* for use at trial.

[70] Whereas under r 7(3A)(a) of the RCA 1994, the court must be satisfied that at the hearing before the High Court or the subordinate court, as the case may be, *the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available*.

[71] It appears that the r 7(3A) of the RCA 1994 provide for two situations under para (a), which we consider as a lower threshold than the requirement in *Ladd v Marshall* which only specify one condition under the first element for

A the new evidence to be accepted. The rule requires for the applicant to satisfy either one of the conditions in (a), namely, (i) the new evidence was not available to the party seeking to use it; *or* (ii) that reasonable diligence would not have made it so available. It is clearly a disjunctive requirement.

B *'Important influence' v 'Determining influence'*

[72] In the present proceedings, the appellant submits that there are 'significant differences' between the *Ladd v Marshall* criteria and those set out in r 7 of the RCA 1994, and that the phrase 'determining influence' in r 7(3A) C imposes a higher/stricter threshold compared to the 'important influence' requirement in *Ladd v Marshall*. The appellant submits that there is 'uncertainty' in the application of r 7(3A) concerning the admission of fresh evidence at the appellate stage because the Court of Appeal had applied the rule 'inconsistently'. D

[73] The respondent's reply is that the application of *Ladd v Marshall* does not render r 7(3A) superfluous as the conditions therein are to be read harmoniously with r 7(3A) of the RCA. On the appellant's submission that r E 7(3A) imposes a stricter threshold, the respondent's answer is that *Ladd v Marshall* actually places a higher threshold on the party seeking to adduce the fresh evidence as r 7(3A) only requires two conditions to be fulfilled whereas *Ladd v Marshall* lays down three conditions. The respondent also submits that, despite the difference in words used, 'important influence' and 'determining' F influence' has been used interchangeably.

[74] It is pertinent at this juncture to refer to the dictionary definition of 'important' and 'determining':

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No	Authority	'Important'	'Determining'
1	Oxford Advanced	1. Having a great effect on people or things; of great value	1. To discover the facts about something; to calculate something exactly
H	Learner's Dictionary	2. (of a person) having great influence or authority	2. To make something happen in a particular way or be of a particular type

I

No	Authority	'Important'	'Determining'
2	Oxford Learner's Dictionary of Academic English	1. Having a great effect on people or things; of great value 2. (of a person) having great influence or authority	1. To make something happen in a particular way or be of a particular type 2. To discover the facts about something
3	Cambridge Dictionary	1. Necessary or of great value 2. Having great effect or influence	To control or influence something directly, or to decide what will happen To discover the facts or truth about something

[75] From the aforesaid, evidently, the literal/dictionary meaning for both is different.

[76] Prima facie, one may accordingly argue that 'determining influence' sets a higher standard than that required by 'important influence', because while all evidence which has a 'determining influence' will necessarily be important, arguably not all evidence that has an 'important influence' will necessarily be determinative. In other words, important evidence *may* and will *usually* also be determinative evidence, but the fact that it is of great value may, or may not, be the deciding factor in the matter.

[77] This is especially true at the trial stage when the court has to consider a myriad of evidence before arriving at a decision. However, at the appellate level when the 'determining influence' test in r 7(3A) of the RCA 1994 comes into play, we prefer the view that, notwithstanding the different semantics, 'important influence' is comparable to 'determining influence' because at that level, the only evidence in question is that particular piece of evidence sought to be adduced and whatever the label applied, the effect will necessarily be determinative of the outcome on the case at the lower court.

[78] To illustrate our proposition, assuming that instead of 'determining influence', the appellate court uses 'important influence' to decide if new evidence should be adduced: if the evidence were held to be not important, it would not be allowed and the status quo remains — hence also determinative for the appellate level and below. In this context, the evidence is important in that it is determinative. It must be borne in mind that the appellate court, when

A evaluating an application to adduce further evidence under r 7(3A) of the RCA 1994, is already in a position where it is in possession of the other relevant material facts which led to the decision given by the lower court. It thus follows that regardless of the label ascribed to the evidence, be it 'important' or 'determining', what is crucial is, if the evidence has a likelihood of affecting the B outcome of the decision of the court below.

[79] Fortifying our view is the fact that under r 7(3A)(b) of the RCA 1994, all that is required is that the evidence 'would have had or *would have been likely to have* had a determining influence upon the decision of the High Court or the C subordinate court'. Clearly, 'would have been likely to have' is not 'would have had'. 'Would be likely to have' suggests that it is sufficient for the evidence to be important enough to probably alter the outcome of the decision of the lower court. In light of this, it is our opinion that the decided cases were not wrong D in applying the 'important influence' criterion despite the terminology employed in r 7(3A) of the RCA 1994.

[80] For these reasons, while it is true that taken at face value, the dictionary meaning for 'determining influence' suggests a higher threshold, we are of the E view that, practically speaking, and in reality, the demarcation between 'important' and 'determining' under r 7(3A) is of no consequence at the appellate level.

Credibility

F

[81] The third condition in *Ladd v Marshall* stipulates that the evidence 'if given', must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible. Rule 7(3A) does not expressly mention 'credible' or 'credibility', but it refers to evidence G which 'if true' would have or would be likely to have a determinative influence.

[82] It is our considered view that, the existence of the words 'if true' and the absence of the words 'credible' or 'credibility' does not affect the application of the third condition in *Ladd v Marshall*.

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[83] A closer examination reveals that the judicial process undertaken in both *Ladd v Marshall* and r 7(3A)(b) of the RCA 1994 remains effectively the same in substance and purpose, and this is for the following reasons. Both the words, 'if true' and 'if given' require the court to hypothetically assess the I impact of the fresh evidence would have had on the earlier decision. The word, 'if true' under r 7(3A)(b) directs the court to assess the *likely influence* of the new evidence on the outcome, assuming it is truthful. The word, 'if given' in *Ladd v Marshall* requires the court to consider what influence the evidence would have had if it had been presented at trial.

[84] In both instances, the court does not make a final finding of truth at this stage but rather assumes the truth (or credibility) of the evidence to determine its potential effect on the earlier decision.

[85] Furthermore, in *Ladd v Marshall*, one of the criteria is that the evidence must be 'apparently credible although not incontrovertible'. This mirrors the 'if true' requirement in r 7(3A)(b), which similarly does not demand proof of veracity but assumes truth for the sake of assessing influence.

[86] Therefore, despite using the word 'true,' r 7(3A) is not imposing a different threshold of proof; rather, it invites the court to proceed on the assumption that the evidence is true for evaluative purposes, just as the court in *Ladd v Marshall* considers the hypothetical effect of the evidence if it had been admitted.

[87] We conclude that, in the UK, while the phrase 'special grounds' is absent from the Civil Procedure Rules, the established principles remain relevant as examples of how the courts strike a fair balance between finality in litigation and the desirability that the judicial process should achieve the right result (see *Hertfordshire Investments Ltd* at p 2325E). Be that as it may, it is significant to note that English authorities have held that the *Ladd v Marshall* criteria are 'principles rather than rules' which should not be seen as a 'straightjacket' confining the exercise of the court's discretion in deciding whether to permit the introduction of new evidence (see *Hertfordshire Investments Ltd* at 2325H. Also see *Hamilton v Al Fayed* [2000] All ER (D) 2450; [2001] EMLR 15 at 401).

[88] In Singapore the Court of Appeal made similar pronouncement to that effect in *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] SGCA 41; [2019] 2 SLR 341 where the Court of Appeal said that:

> [37] The above analysis, which focuses on the nature of the proceedings giving rise to the judgment appealed against, is only one facet of the inquiry which the court must undertake in determining the rigour with which the *Ladd v Marshall* principles should be applied. The cases reveal that even after the nature of the proceedings below have been considered, the fulfilment of the *Ladd v Marshall* conditions does not bind the court's hands in admitting fresh evidence, and conversely the court is not prevented from admitting fresh evidence even in the absence of strict compliance with these conditions. *Rather, the court retains its overarching discretion to act as the interests of just ice require, which includes the discretion to admit new evidence despite the applicant's failure to satisfy the conditions of Ladd v Marshall. Thus, this court has rightly cautioned that the Ladd v Marshall test should not be applied rigidly as if it were as tatutory provision* ... (Emphasis added.)

[89] The Australian authorities have acknowledged that:

A There is no precise formula as to how the Court should exercise its discretion in deciding whether to admit further evidence on appeal. However, it has been said that the exercise should be undertaken with regard to the context in which it arises (including the nature of the litigation) and also the public interest in the finality of litigation: *Doherty v Liverpool Hospital* (1991) 22 NSWLR 284 at 297' (see: the B Supreme Court of Western Australia case of *Australian Democrats WA Division Inc and Anor v Australian Democrats VIC Division Inc and Ors* [BC9805206] (supra) at 7)

C **[90]** It is therefore clear that the courts in the UK, Singapore and Australia generally apply the *Ladd v Marshall* principles in accordance with their respective legislative regimes but do not regard the conditions as a set of inflexible rules to be applied uncritically. Nevertheless, in the UK they remain powerful and persuasive in interpreting the English CPR r 52 and PD 5.11 of the UKSC Rules 2024, with the overriding concern that it should be applied D with considerable care (see *Hertforshire Investments Ltd v Bubb and Anor*). The courts in these jurisdictions have on occasion departed from demanding full compliance with a particular condition when the interests of justice require it. In *Singh v Habib*, the Court of Appeal considered the *Ladd v Marshall* criteria and held that there was a stronger public interest justification for admitting E fresh evidence, in particular, when there was an allegation of fraud and conspiracy to fabricate a claim. However, public policy consideration is not part of the *Ladd v Marshall* criteria.

F **[91]** Given the foregoing, it is our judgment that a similar approach may be adopted by the courts here: namely that while the *Ladd v Marshall* conditions remain apposite, they should not be construed as strictly as though they have statutory or legislative force, but rather, they should be treated as a set of guidelines to be adapted as the interests of justice may require according to the G circumstances of a particular matter, in accordance with our legislative regimes ie r 7 of the RCA 1994. We are of the considered view that the *Ladd v Marshall* criteria serve as a useful interpretive tools when judges give legal effect to the provisions of the said rule.

H THE APPLICATION OF R 7(3A) OF THE RCA 1994 TO THE PRESENT APPEAL

[92] We will now focus on the facts of the present appeal whether the respondent has satisfied the requirements of r 7 of the COA Rules to admit the I new evidence.

[93] First, on the requirement by the provision of r 7(3A)(a) of the RCA 1994, that 'the new evidence was not available' or that 'reasonable diligence would not have made it so available'. To determine this issue, we refer to the

chronology of events as to the availability of the new evidence, vis a vis, the addendum order and the efforts to obtain the same, which are as follows:

Date	Chronology of Events
12 February 24	The respondent received reliable information about YDPA issuing the addendum order.
14 February 24	The respondent instructed his solicitors to confirm details of the addendum order which was carbon copied to the Prime Minister.
22 March 24	The matter reached the Minister of Home Affairs regarding the addendum order.
April 2024	The respondent filed his judicial review application in High Court.
3 July 2024	The application for judicial review was dismissed by the learned High Court judge.
4 August 2024	Mohamad Nizar attended the official opening ceremony of the Tuanku Azizah Royal Craft Complex in Pulau Keladi, Pekan Pahang. Mohamad Nizar was an invited guest in his capacity as a member of the Pahang Executive Council ('EXCO'). The ceremony was officiated by the Sultan of Pahang, who was the previous YDPA XVI. During the event, the Sultan of Pahang informed Mohamad Nizar of his intention to provide a copy of the addendum order to the latter.
17 August 2024	Mohamad Nizar received an envelope, in which was a copy of the addendum order as mentioned by the Sultan of Pahang on 4 August 2024. However, he was explicitly instructed not to use it for any purpose without the express consent or permission from the Sultan of Pahang.
18 August 2024 until 2 December 2024	Mohamad Nizar had submitted multiple requests for authorisation for the addendum order to be used, but such permission was never granted.
2 December 2024	In the affidavit, Mohamad Nizar affirmed that he finally obtained approval from YDPA to disclose the addendum order on 2 December 2024.
3 December 2024	Before the Court of Appeal the applicant filed a motion to introduce fresh evidence via encl 26 and encl 50, namely the addendum order.
9 December 2024	Solicitors for the applicant requested for the original copy of the main order from the Kajang Prison, to which there was no reply.

Date	Chronology of Events
5 January 2025	Letter in writing from Istana signed by Pengelola Bijaya Di Raja from the Office of Pejabat Kebawah Duli Paduka Baginda Sultan Pahang stating that the copy of the addendum order itself 'wujud'.
6 January 2025	Court of Appeal dismissed encl 50 and allowed encl 26.

[94] From the chronology of events as aforesaid, as early as 12 February 2024, numerous efforts were taken by the respondent to obtain information to confirm the details of the addendum order through his solicitors. This is understandable, given that he is in prison serving his sentence. He has no choice but to rely on the good office of his solicitors. From 12 February 2024 until the time the respondent filed the judicial review application in April 2024, his efforts to obtain the confirmation on the addendum order via the Prime Minister's Office, the Ministry of Home Affairs, the Pardons Board, the DG of Legal Affairs of the PM's Department, all met with a dead end, if not futile. This continued until the High Court delivered its decision on 3 July 2024.

[95] Efforts to obtain the addendum order were continued after the decision of the High Court, by the respondent's son, Mohamad Nizar, who received a call from the Pengelola Bijaya Diraja Kebawah Duli Paduka Baginda Sultan Pahang, Dato' Hj Ahmad Khirrizal Ab Rahman from the Pahang Palace 'dengan cara tiba-tiba' on the night of 4 January 2025 at 10.25pm, when he was informed that a letter would be sent to him personally, later. The letter was sent to Mohamad Nizar on 5 January 2025, by which he then affirmed an affidavit. In his affidavit in encl 52 he said that:

> 8. ... beliau (Pengelola Bijaya Diraja Kebawah Duli Paduka Baginda Sultan Pahang, Dato' Haji Ahmad Khirrizal Ab Rahman from the Pahang Palace) menyerahkan kepada saya sepucuk surat bertarikh 4.1.2025.
>
> 9. Surat tersebut menyatakan bahawa KDPB Sultan Pahang selaku Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong XVI telah pada 29hb Januari 2024 menitahkan (melalui Titah Addendum) supaya perayu dalam rayuan ini menjalani baki hukuman pemenjaraan menerusi penahanan dalam rumah (house arrest). Seterusnya KDPB Sultan Pahang juga telah memperakukan bahawa Titah Addendum berkenaan memangnya wujud dan sahih. Saya memang percaya penuh bahawa KDPB Sultan Pahang telah pun mengambil keputusan menghantar surat tersebut memandangkan perkembangan terkini dalam beberapa hari ini bagi hemat saya berniat untruk memberi pengesahan terhadap fakta-fakta yang sebenarnya. Saya bersyukur bahawa Baginda Berkenan dan bertitah untuk mengesahkan Titah Adendum itu memang wujud melalui surat rasmi pejabat KDPB Sultan Pahang pada 5 hb Januari 2025.

10. Dalam surat tersebut, KDPB Sultan Pahang secara jelas mengesahkan bahawa addendum yang saya lampirkan dalam affidavit saya bertarikh 2hb Disember adalah addendum bertarikh 29hb Januari 2024 yang sah dan benar, yang memerintahkan bahawa Dato'Sri Najib bin Tun Haji Abd Razak perlu menjalani baki hukuman penjaranya di bawah tahanan rumah.

[96] Prior to 2 December 2024, there was no authorisation to Mohamad Nizar to disclose the addendum order. It was only until 5 January 2025 that Mohamad Nizar received the letter from Pengelola Bijaya Di Raja from the Office of Pejabat Kebawah Duli Paduka Baginda Sultan Pahang which states that the addendum order exists.

[97] Clearly from the above, the first condition of r 7(3A)(a), namely, that the new evidence was not available to the respondent, has been fulfilled. Apart from the relentless and repeated attempts to obtain the addendum order by the respondent, there is also the issue of the sensitive nature of the addendum order and the strict protocol of the matters involving the Palace. Hence, we are of the view that the respondent has also satisfied the second condition of r 7(3A)(a) of the RCA 1994 on 'reasonable diligence'. The minority in the Court of Appeal had erred in fact in this respect when Her Lordship ruled that the reasonable diligence element was not fulfilled (paras 56–64 of the Court of Appeal minority judgment).

[98] In relation to the requirement of 'determining influence' under r 7(3A)(b); the issue is whether the addendum order would have a determining influence on the High Court decision. The minority decision in the Court of Appeal at para [55] of the judgment opined that the respondent had satisfied the condition (ii) and (iii) of *Ladd v Marshall* and ruled that 'the proposed fresh evidence will have an important influence on the result of the appeal and that the fresh evidence is credible'.

[99] The issue of 'determining influence' is important in light of the argument made by the appellant in their written submissions that the 'subject matter herein hinges on the 'high prerogative exercisable' by the YDPA. As such, the court has no jurisdiction to confirm or vary the decision made by the YDPA in the pardon process', by placing reliance on the case of *Public Prosecutor v Soon Seong Sia Heng* [1979] 2 MLJ 170 (FC). The case of *Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 MLJ 529 (FC) which involved a petition for clemency, the Federal Court held that the decision-making process of the decision by the Sultan of Pahang under art 15 of the Laws of the Constitution of Pahang, read together with art 42 of the Federal Constitution, is not justiciable.

[100] There are two points to take note of, from the arguments by the appellant, namely:

(i) the issue on the element of 'determining influence' of the new evidence; and

(ii) whether it (the new evidence) affects the 'high prerogative exercisable' by the YDPA (issue of non-justiciability).

[101] For this we refer to the essential excerpts of the addendum order which is as follows:

> ... Beta dengan ini menitahkan *sebagai tambahan kepada keputusan Beta* berhubung ..., Dato'Sri Mohd Najib bin Tun Haji Abdul Razak ... pada Mesyuarat Lembaga Pengampunan Wilayah-Wilayah Persekutuan Kuala Lumpur, Labuan dan Putrajaya kali ke 61 pada hari Isnin, 29 Januari 2024 ... Dato' Sri Mohd Najib bin Tun Haji Abdul Razak ... menjalani baki hukuman menerusi penahanan dalam rumah (House Arrest) ...

[102] To answer the issue on the element of 'determining influence' of the new evidence as mentioned at para [100](i) above, with these essential excerpts at para [101] as aforesaid which is before this court, at this juncture, this court cannot conclusively dismiss the addendum order as not forming part of the pardons order of the Pardons Board and neither can we say that it is. The addendum order originated from the Palace of the Sultan of Pahang who was the YDPA XVI on 29 January 2025. True or not of the addendum order and its validity cannot be determined conclusively, at this stage.

[103] However, it is our view that, following the precise words in r 7(3A)(b) of the RCA 1994, the addendum order, 'if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court' in the judicial review application. In other words, this issue as to whether the addendum order is 'true' or not, is an arguable point to be ventilated in the substantive hearing of the judicial review application.

[104] Given the aforesaid, it is our judgment that the respondent has satisfied the elements under r 7(3A) of the RCA to admit the addendum order as new evidence to be used at the substantive hearing of the judicial review application, which is an indication that leave ought to be granted.

[105] On the point as stated in para 100(ii) abovementioned, on the issue of justiciability, it is trite that the prerogative mercy of the YDPA is non-justiciable and the courts cannot confirm or vary it; in other words, the courts have no jurisdiction to do so. However, the facts in the present appeal is rather peculiar. There is the pardons order of the Pardons Board dated 29

January 2024 and the addendum order which 'appears' to be 'tambahan kepada keputusan Beta …', to the pardons order also dated 29 January 2024.

[106] In this regard, we are not attempting to vary nor confirm the order of the YDPA XVI/Pardons Board dated 29 January 2024. But as of now, the addendum order exists and its status vis a vis its validity or whether it is true, needs to be ascertained at the substantive hearing, which we do not consider it right or fair for us to express any view on this point at this stage. It is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such arguments as is necessary on the law.

[107] Therefore, in answering questions 1–3, it is our considered view that r 7(3A) of the RCA 1994 is the statutory provision with regards to admission of new evidence at the appellate level. Although the exact wordings of the essential elements in *Ladd v Marshall* and the elements in r 7(3A) of the RCA 1994 are not word per word the same, the effect and the consequence of applying the elements in r 7(3A) of the RCA 1994 and the elements in *Ladd v Marshall* lead to the same conclusion. As to whether r 7(3A) 'encapsulates', 'codifies' or 'reflects' the test in *Ladd v Marshall*, for want of a better term, we prefer the word 'encapsulates' which means, it expresses the essential features of the test in *Ladd v Marshall* succinctly.

[108] To sum up, we allow the addendum order to be admitted as new evidence under r 7 of the RCA 1994 and that leave is granted to the respondent for the judicial review application in the High Court. Therefore, we answer the questions as follows:

(a) for question 1: The principles established in *Ladd v Marshall* is encapsulated in r 7(3A) of the RCA 1994;

(b) for questions 2 and 3: negative;

(c) questions 4–6 are no longer relevant in view of the concession by the learned AG of the existence of the addendum. They are now hypothetical and academic which we decline to answer; and

(d) question 7 relates to the challenge on the decision of the Pardons Board, which we have explained in the preceding paragraphs. We will not answer this particular question now. But we will leave this issue to be addressed at the substantive stage of the judicial review proceedings, if needs be.

[109] Given the aforesaid, our unanimous decision are as follows:

(a) we dismiss the Civil Appeal No 01(i)-12–05 of 2025(W):
ie the appeal against the decision of the Court of Appeal dated 6 January 2025 which allowed the appeal against the decision of the High Court

dated 3 July 2024 which dismissed the application for leave for judicial review;

(b) we dismiss the Civil Appeal No 01(i)-13–05 of 2025(W): ie the appeal against the entire majority decision of the Court of Appeal dated 6 January 2025 with regards to the notice of motion to adduce additional or fresh evidence;

(c) we set aside part of the decision of the Court of Appeal which dismissed encl 50. We allow prayer 1 of encl 50, as well as paras 1 and 3 of Annexure A to encl 50;

(d) consequently, we remit the case to the High Court for the hearing of the substantive judicial review proceedings before a new judge; and

(e) we made no order as to costs.

Appeals dismissed; COA's decision affirmed except in respect of encl 50 which was partly allowed.

Reported by Ashok Kumar